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UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

In re	§	
	§	
ARNOLD HARRY HUSEMAN and	§	
CATHERINE EMMA HUSEMAN,	§	Case No. 02-20227
	§	Chapter 7
Debtor.	§	
	§	
ARNOLD HARRY HUSEMAN et al.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adversary No. 02-2017
	§	
FARM SERVICE AGENCY,	§	
	§	
Defendant.	§	

DEFENDANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Defendant United States of America, by and through the United States Attorney for the Northern District of Texas, submits its Proposed Findings of Fact and Conclusions of Law as follows:

If a conclusion of law is incorrectly listed as a finding of fact, or vice versa, it shall be treated as set forth in the appropriate categories herein.

Findings of Fact

1. On or about December 9, 1998, debtor Arnold Huseman signed two Conservation Reserve Program ("CRP") contracts covering Farm Nos. 2198 and 2199, Castro County, Texas. Mr. Huseman also signed the contract on behalf of his wife, Catherine Huseman. Each contract had a 10-year term. Under the terms of these two contracts, Mr. Huseman was to receive annual payments in the respective amounts of $6,800.00 and $4,604.00.

2. On February 26, 2002, Mr. and Mrs. Huseman filed a Chapter 7 bankruptcy case. At the time of this filing, the debtors owed the United States of America, acting through the Farm Service Agency ("FSA"), the total sum of $375,430.07 on account of three unpaid loans made to the debtors.

3. Prior to the filing of the instant case, and by letter dated May 11, 2000, Arnold Huseman was notified of the FSA's intention to use offset to collect the debt owed by Mr. Huseman to the FSA. The letter advised Mr. Huseman of his right to appeal this decision of the FSA. Mr. Huseman did not appeal. Subsequently, the FSA collected the 2000 CRP payments by way of offset.

4. At the time of the filing of the instant case, the CRP annual payments due on October 1, 2001, were due and payable.

5. Debtors had filed a Chapter 13 case on September 27, 2001 (Case No. 01-21162) and it was later dismissed on January 17, 2002. The CRP payments became due and payable while that case was pending. The Chapter 7 case was then filed a short time later.

6. On or about April 10, 2002, debtor Arnold Huseman reaffirmed his obligations under the CRP contracts. The reaffirmation agreement was signed by the debtor on April 10, 2002 and filed on May 3, 2002.

7. On June 24, 2002, debtors received a discharge.

Conclusions of Law

1. Complaints in adversary proceeding must be served in the manner provided by Bankruptcy Rule 7004. Bankruptcy Rule 7004(b)(5) requires that a summons and complaint served upon an agency of the United States must be mailed to the agency and to the United States as required by Rule 7004(b)(4). Service upon the United States under Rule 7004(b)(4) is accomplished by mailing a summons and complaint to the United States Attorney for the District in which the action is brought and to the Attorney General in Washington, D.C.

The Debtors' motion in this adversary proceeding (which was treated as a complaint) was served only on the Farm Service Agency. The record in this adversary proceeding shows that a summons was issued only for the Farm Service Agency. The Court's file contains no proof of Debtors serving a summons and complaint on the United States Attorney and the Attorney General in Washington, D.C. Debtor failed to meet the

requirements of Bankruptcy Rule 7004(b), and failed to properly serve the FSA in this matter.

The fact that the FSA or the United States may have actual knowledge and notice of debtors' motion *does not cure* the lack of proper service and does not provide this Court with jurisdiction over the United States or its agency. *In re Harlow Properties, Inc.*, 56 B.R. 794, 799 (B.A.P. 9th Cir. 1985); *In re Terzian*, 75 B.R. 923, 925 (Bankr. S.D. N.Y. 1987); *In re Legend Industries, Inc.*, 49 B.R. 935, 937-38 (Bankr. E.D. N.Y. 1985); *In re Brown*, 7 B.R. 486, 487 (Bankr. N.D. Ga. 1980); *see also Zapata v. Smith*, 437 F.2d 1024 (5th Cir. 1971); Wright & Miller, Federal Practice and Procedure, Civil § 1106. The lack of proper service upon the United States and its agency is a ground for dismissal of the motion and it is not an abuse of discretion for a court to dismiss a lawsuit for lack of proper service upon the United States. *System Signs Supplies v. U.S. Department of Justice*, 903 F.2d 1011 (5th Cir. 1990); *George v. U.S. Department of Labor*, 788 F.2d 1115 (5th Cir. 1986).

2. This Court is without jurisdiction of this adversary proceeding because debtors have failed to first exhaust their administrative remedies. The exhaustion of *all* administrative appeal procedures is, under 7 U.S.C. § 6912(d), a mandatory prerequisite to a suit being filed against an agency of the USDA or the USDA itself. *See Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 95 (2nd Cir.), *cert. denied*, 119 S. Ct. 539 (1998); *Calhoun v. USDA Farm Service Agency*, 920 F. Supp. 696, 702 (N.D. Miss. 1996);

Bogart v. FSA, Adversary No. 00-5064, U.S. Bankruptcy Court for the Northern District of Texas, Lubbock Division.

Although debtor Arnold Huseman was affected by an FSA adverse decision and action regarding the offset of CRP payments and he was made aware of his right to administratively appeal that decision, he did not pursue any administrative appeals. Debtor has sat on his rights. This adversary action should be dismissed for lack of jurisdiction because of debtor's failure to first exhaust his administrative remedies.

3. As for debtor Catherine Huseman, she lacks standing to maintain the action. As to her, the motion fails to state a claim upon which relief may be granted. The contracts at issue provide that debtor Arnold Huseman is to receive 100% of the payments and that Catherine Huseman is to receive no payments. Thus, debtor Catherine Huseman has no right to the CRP payments at issue. Accordingly, her claim to the payments must be dismissed.

4. The United States can be sued only with its consent and Congress may specify the terms and conditions of suits which it may authorize. United States v. Sherwood, 61 S. Ct. 767 (1941). This is true with respect to agencies of the United States and these agencies may not be sued in their own name unless there is a statute authorizing such action. *See Blackmar v. Guerre*, 72 S. Ct. 410 (1952); *NLRB v. Nash-Finch Co.*, 92 S. Ct. 373 (1971); *Castleberry v. Alcohol, Tobacco and Firearms Division*, 530 F.2d 672, 673 n. 3 (5th Cir. 1976) (Treasury Department and Bureau of Alcohol, Tobacco and Firearms of the U. S. Department of Treasury may not be sued *eo nominee*.).

The FSA is an agency of the United States within the United States Department of Agriculture. 7 U.S.C. § 6932. There is no statute authorizing suit against the FSA in its own name. Therefore, the FSA is not a suable entity. Any suit naming the FSA as a defendant must be dismissed because the Court lacks jurisdiction to entertain such a suit. *Cf. Owyhee Grazing Ass'n v. Field* 637 F.2d 694, 697 (9th Cir. 1981) (Farmers Home Administration is not a legal entity and may not be sued.); *Gray v. Rankin*, 721 F. Supp. 115, 117 n. 3, (S.D. Miss. 1989) (Farmers Home Administration cannot be sued *eo nominee*.); *Lathan v. Block*, 627 F. Supp. 397, 405 (D. N.D. 1986) (Complaint against the Farmers Home Administration was dismissed because the agency may not be sued *eo nominee*.); *Kleen Leen, Inc. v. Cook*, 376 F. Supp. 492, 493 (D. S.C. 1974) (Suit against the Farmers Home Administration was dismissed for lack of jurisdiction because the United States has not consented for that agency to be sued in its own name.).

5. The FSA is not the proper party defendant because it is not a party to the contracts at issue. Accordingly, the action against the FSA should be dismissed.

6. To the extent that the debtors are seeking turnover under 11 U.S.C. § 542, debtors lack standing to pursue a turnover action. The exercise of rights under § 542 are limited to a trustee and to property of the estate. Debtors are not the trustee and, as Chapter 7 debtors, they lack any trustee powers. Furthermore, debtors have alleged that the subject CRP payments are not property of the estate since debtors assert that they claimed them as exempt. Moreover, any right of turnover under § 542 is expressly

subject to the right of offset under § 553. 11 U.S.C. § 542(b). The FSA has filed a counterclaim asserting its right of offset.

7. The parties to the two CRP contracts are the debtor, Arnold Huseman, and the Commodity Credit Corporation ("CCC"). CCC is a corporate agency of the United States government within the U.S. Department of Agriculture. 15 U.S.C. § 714. The CCC is the USDA agency which funds these programs and on whom the CRP check is drawn. Thus, the CCC is the party against whom the debtors should seek relief. However, the CCC is protected against turnover orders such as the one which debtors seek in their adversary proceeding.

Under 15 U.S.C. § 714b(c), no "attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the [Commodity Credit] Corporation or its property." The CRP payments at issue are property of CCC and are protected by this statute.

The turnover order sought by debtors is nothing more than a mandatory injunction which is prohibited by 15 U.S.C. § 714b(c). *Mar V. Kleppe*, 520 F.2d 867 (10th Cir. 1975); *Romeo v. U S.*, 462 F.2d 1036 (5th Cir. 1972), *cert. denied*, 93 S.Ct. 1361 (1973); *see also Expedient Services, Inc. v. Weaver*, 614 F.2d 56, 57-58 (5th Cir. 1980).

8. The FSA is entitled to a default judgment on its counterclaim because debtors filed no reply and wholly made default.

9. The FSA is entitled to offset the CRP payments to satisfy its claim against the debtors. The general elements for setoff are: (a) the creditor must have a right of

setoff; (b) there must be mutuality of the parties; and (c) there must be mutuality of obligations. *In re Davidovich*, 901 F.2d 1533, 1537 (10th Cir. 1990); *Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030, 1035 (5th Cir. 1987); *In re Republic Financial Corp.*, 47 B.R. 766, 767-768 (Bankr. N.D. Okla. 1985); *In re Braniff Airways, Inc.*, 42 B.R. 443, 447-449 (Bankr. N.D. Tex. 1984); 5 Collier on Bankruptcy, ¶ 553.01 (15th Ed. Rev. 1999). In bankruptcy cases, prepetition debts and claims may not be setoff against postpetition debts and claims. *Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d at 1036-1037; *In re Braniff Airways, Inc.*, 42 B.R. at 449.

a. The United States has a right of setoff. It is well recognized that the United States of America may exercise a right of setoff to collect debts owed to it. *U.S. v. Munsey Trust Co.*, 67 S. Ct. 1599 (1947); *Barry v. U.S.*, 33 S. Ct. 681 (1913); *McKnight v. U.S.*, 98 U.S. 179, 185-186 (1879); *Gratiot v. U.S.*, 15 Peters 336, 370, 10 L.Ed. 759 (1841); 1 Comp. Gen. 605 (1922). The United States enjoys a common law right of setoff which is "inherent" and which exists independent of any statutory grant of authority. *U.S. v. Tafoya*, 803 F.2d 140, 141-142 (5th Cir. 1986).

In addition to this common law right of offset, the United States (acting by and through the FSA) has a contractual and regulatory basis for its right of setoff in this case. The CRP contracts at issue here expressly provide for offset. The contract also incorporates the provisions of the program regulations (7 C.F.R. Part 1410) into the contract. Those regulations provide at 7 C.F.R. § 1410.57 that

payments will be allowed without regard to the claims of creditors "except agencies of the United States Government." Therefore, the contract and the incorporated program regulations both provide that payments would be offset to collect debts owed to agencies of the U.S. Government.

b. There is mutuality of the parties. Agencies of the United States of America may make setoffs to collect debts owed to other agencies. *Cherry Cotton Mills, Inc. v. U.S.*, 66 S. Ct. 729 (1946) (U.S. Treasury and RFC); *Gratiot v. U.S.*, *supra* (Department of the Treasury and Department of the Army); *U.S. v. Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998) (Navy and SBA); *In re Hal, Inc.*, 122 F.3d 851, 852 (9th Cir. 1997)("[F]or purposes of setoff under § 553, the agencies of the United States constitute a single 'governmental unit.'"); *In re Turner*, 84 F.3d 1294, 1298 (10th Cir. 1996) ("[T]he United States is a unitary creditor for setoff purposes in bankruptcy."); *Luther v. U.S.*, 225 F.2d 495 (10th Cir. 1954) (IRS and CCC); *In re Parrish*, 75 B.R. 14 (Bankr. N.D. Tex. 1987) (FmHA and CCC); *Waldron v. FmHA*, 75 B.R. 25 (Bankr. N.D. Tex. 1987) (FmHA and CCC); *In re Sound Emporium*, 70 B.R. 22 (Bankr. W.D. Tex. 1987) (IRS and U.S. Army); *In re Thomas*, 84 B.R. 438, 439-440 (Bankr. N.D. Tex. 1988), *aff'd in part and rev'd in part*, 91 B.R. 731 (Bankr. N.D. Tex. 1988), *modified*, 93 B.R. 475 (Bankr. N.D. Tex. 1988) (Offset involving the SBA, the FmHA, the CCC and the IRS).

c. <u>There is mutuality of obligations</u>: The claim of the FSA against the debtors is a prepetition claim because the claim is based upon prepetition loans

made to the debtors which remain unpaid. The debt owing by the CCC to the debtors under the CRP contracts is also prepetition in nature because the CRP contracts were entered into and became effective prepetition.[1] See In re Parrish, 75 B.R. at 16. The CCC's obligation to pay the debtors under the contracts was a prepetition obligation (or was a prepetition debt owed by CCC to the debtors). This obligation to make payments to the debtors was a present obligation, prepetition in nature, despite the fact that it may have been contingent upon the availability of funds or that the payments would not be made (or were not due) until sometime in the future. *Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d at 1035-1037; *In re Parrish*, 75 B.R. at 16; *In re Braniff Airways, Inc.*, 42 B.R. at 451.

Respectfully submitted,

JANE J. BOYLE
United States Attorney

By _____
D. Gordon Bryant, Jr.
Assistant United States Attorney

[1]The contracts provide at ¶ 14 of the Appendix that the contracts become effective when signed by the participants and by the CCC representative. Debtor Arnold Huseman signed the contracts on December 9, 1999 and the CCC representative signed the contracts on September 15, 1999. Therefore, the contracts became effective prepetition on December 9, 1999 after it was signed by both Mr. Huseman and the CCC representative.

CERTIFICATE OF SERVICE

I, D. Gordon Bryant, Jr., Assistant United States Attorney for the Northern District of Texas, hereby certify that a true and correct copy of the foregoing was served by mail on this the 12th day of November 2002, on Arnold Harry Huseman and Catherine Emma Huseman, Box 172, Nazareth, Texas 79063, debtor, on Rodney R. Betts, Amarillo National Bank Plaza II, 500 S. Taylor St., LB 263, Suite 908, Amarillo, Texas 79101-2447, attorney for debtor, and on Kent Ries, 500 S. Taylor, Suite 902, LB 205, Amarillo, Texas 79101, trustee.

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